Filed 5/3/19 Gelles v. Willis CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LAURA GELLES, as Trustee, etc., Plaintiff and Respondent, v. KAYRETHA HALE WILLIS, Defendant and Appellant.	B282577 (Los Angeles County Super. Ct. No. BP127033)

APPEAL from an order of the Superior Court of Los Angeles County, William Barry, Judge. Affirmed.

Law Offices of Kayretha Hale Willis and Kayretha Hale Willis, in pro. per., for Defendant and Appellant.

Lesley Davis Law and Lesley B. Davis for Plaintiff and Respondent.

Appellant Kayretha Hale Willis appeals an order of the probate court directing her to disgorge attorney fees paid to her by the trustee of a special needs trust. She contends she did not receive proper notice of the hearing because she moved her office without filing and serving a change of address form, that she was entitled to relief from default under Code of Civil Procedure section 473, and that disgorgement was not an appropriate remedy for what she views as inconsequential defalcations. For the reasons discussed, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2009, respondent Laura Gelles filed a petition for appointment to become temporary conservator of the estate of Amalie Gelles in order to execute the Amalie Gelles Special Needs Trust. The petition contended Amalie, respondent's sister, who was institutionalized in a locked facility with a diagnosis of schizophrenia, had recently become entitled to a distribution from a family member's trust. The petition was approved and a Special Needs Trust (the Trust) created.

A first accounting was filed in June 2011, indicating the Trust had $37,053.25 in cash assets and $183,748.36 in non-cash assets. In April 2012, a declaration submitted by respondent, then represented by attorney Galen Griepp, stated that respondent was having difficulty organizing the paperwork needed to prepare an additional accounting. In

October 2012, appellant Kayretha Hale Willis substituted in as counsel for respondent in Griepp's place.

During the period appellant represented respondent and the Trust, proposed accountings were filed in February 2013, March 2014 and January 2016.[1] The accountings were not approved. After reviewing each submission, the court provided a list of "notes" or "matters to clear," seeking further information about the assets and disbursements.[2]

In June 2016, Lesley Davis substituted in as attorney for respondent, replacing appellant. At the hearing, the court inquired whether appellant's case files were in a condition to be turned over to respondent's new counsel; appellant assured the court they were. In July 2016, Davis

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[1] In December 2015, orders to show cause (OSC) had been issued directing both appellant and respondent to show cause why no accounting had been filed and why they should not be sanctioned $100 per day for failing to submit an accounting. No sanctions were ordered, however.

[2] For example, comments in multiple orders stated: "atty fees . . . no amt of fees stated; petnr alleges will be made by separate doc. -- not proper -- s/b included w/petn when filed & served." Other notes stated: "If bene resided in a residential care facility during acct period, need care facility statements"; "[e]xplain the 8/8/11 payment to Cecile Gelles described as 'looking for services'"; and "[no] decl supporting any a[t]ty fees request; supp req'd[.]" With respect to the final proposed accounting submitted while appellant was representing respondent, the order stated: "this accounting shows the same deficiencies as in the prior 2d amended account which was filed 3/28/14 . . . ."

filed a declaration stating she had been unable to obtain respondent's files from appellant. Davis stated she had called and/or sent emails to appellant on June 1, 3, 16, 22 and July 14, 2016 asking for a time to pick up the documents and received no response.[3] On July 22, the court issued an OSC regarding the turnover.[4]

Appellant appeared at a hearing on August 8, 2016, at which the court instructed Davis to serve and file a list of the documents respondent believed to be missing. Appellant turned over some documents on August 22. On August 24, Davis sent an email to appellant listing additional documents respondent believed had been turned over to appellant but had not been returned, including a Paypal/credit card statement for 2012, accountings prepared by various individuals in 2011 and 2012, an "expense by category" report prepared by respondent, and miscellaneous receipts for 2012. At a hearing on August 25, appellant informed Davis and the court that she had discovered a box of records while moving her office. The court ordered turnover of those documents the next day, and appellant complied.[5]

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[3] Copies of the emails were attached to the declaration.

[4] It was served on appellant at an address on West First Street, the address she had used since becoming attorney of record.

[5] Respondent's brief states that the court "continued the accounting and the OSC re turnover of records to December 19, 2016" and that appellant "had actual notice of the continuance of
(*Fn. is continued on the next page*.)

In December 2016, Davis filed a declaration re: "turnover client files by prior counsel." The declaration stated that the box of documents turned over on August 26 did not contain many documents, and that in the course of preparing a revised accounting, it became apparent to Davis that she had not been provided with all the supporting documentation appellant had had available. The declaration was served on appellant at the First Street address.

The court set a hearing on an OSC for February 1, 2017. Appellant did not appear at the hearing. Davis represented to the court that based on the proposed accountings prepared by appellant, she must have had additional records. Respondent told the court she had delivered "a whole box of receipts" to appellant that she never received back. As the previous efforts to obtain all the documents had proved unsuccessful, Davis recommended disgorgement of fees if appellant did not cooperate. The court instructed the clerk to serve appellant with an OSC re disgorgement of attorney fees and instructed respondent and Davis to file a declaration listing the documents respondent delivered to appellant and the documents not returned. The court specifically found that appellant had been properly served with notice of the February 1 hearing.

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the accounting and OSC re turnover as she was present at the hearing," citing the court's order of August 25, 2016. The August 25 order states the court set an OSC re the second accounting on that date, but says nothing about turnover of records.

The clerk sent an OSC to appellant at an address on Wilshire Boulevard, directing her to appear on March 3, 2017. However, the notice said the hearing was to show cause "why no appearance made on 02/01/17," and said nothing about disgorgement of fees. (Emphasis omitted.)

Davis sent a notice of ruling and a separate notice of hearing re OSC "re disgorgement of fees for failure to return supporting documentation" to appellant at the First Street address.[6] The request for disgorgement of fees was supported by a declaration executed by respondent, who stated that in August and November 2016, she had sent emails to appellant requesting copies of billing invoices but received no response. Respondent's declaration further stated that in 2013, respondent had paid appellant $7,830 out of Trust funds and $14,500 out of her own funds, but that she did not believe appellant was entitled to any fees due to her "inadequate representation of me in this case" and because she had not filed anything in support of fees with the court. Attached as exhibits to respondent's declaration was the email concerning specific missing documents sent to appellant in August 2016 and another, slightly more extensive, list of missing documents.

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[6] The notice of ruling stated that the hearing concerning the missing documents and disgorgement of fees was to take place on March 16, 2017. The note re disgorgement of fees for failure to return supporting documentation had that date on the front, but stated the hearing would take place on February 16, 2017.

Appellant and Davis appeared on March 3, 2017. There is no transcript of the March 3 hearing in our record. At a subsequent hearing, Davis represented to the court that the judge presiding over the March 3 hearing put the matter over to allow appellant to look at the court file, and that when appellant returned to the courtroom, she represented she had done so. Appellant did not dispute Davis's representation.[7]

On March 16, appellant filed a declaration stating that she had turned over "everything in [her] possession" to Davis, and that she had moved her office to the Wilshire Boulevard address in October 2016.[8] The declaration did not specifically state that appellant had not received the notices and other papers sent to her at the West First Street address. The declaration stated "[d]uring the time I was Attorney in the case, it was difficult for me to obtain documents from the client," but did not dispute respondent's contentions that the specific documents identified by

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[7] The court file appellant reviewed presumably contained both the court's February 1, 2017 minute order directing appellant to appear concerning her failure to produce documents and to answer with regard to disgorgement of fees, as well as the notice of ruling Davis filed February 6, noting the setting of a March 16 OSC hearing re disgorgement of fees for failure to return supporting documentation. Indeed, appellant concedes she was aware in early February 2017 that the court was considering ordering disgorgement of fees.

[8] Appellant did not serve the declaration on respondent or bring copies to the hearing.

respondent had been given to her. Appellant requested a continuance to allow her to file a petition for attorney fees.

At the hearing on March 16, appellant stated that when she looked at the court file on March 3, she learned for the first time about the OSC re missing documents and disgorgement of fees, and represented that "had [she] known earlier . . . [she] would have had [her] petition for fees prepared . . . ." The court inquired whether she had filed a change of address. Appellant admitted she had not. Appellant told the court she had nothing left to produce.

The court took the matter under submission. It issued an order dated March 16, 2017, finding that appellant had "returned all [the documents] she can find, but . . . has not returned all that she received" and that "the rest of the documentation has probably been lost or destroyed while in [appellant's] possession, . . . thus rendering a complete accounting by the Trustee difficult if not impossible." The order further stated: "The other issue for determination . . . is whether or not [appellant] should be ordered to disgorge all sums paid to her by the Trust or [respondent]. [Appellant] filed a declaration addressing the lost documents and records, which the court did not find persuasive, but she did not address the disgorgement issue. She wanted more time to do so, but the court refused her request because it does not see that additional input from [appellant] would change the court's conclusion that she lost a significant portion of the Trust's accounting documentation," which "will probably cause the matter to be closed without a

complete accounting, which is especially troublesome because the [Trust] has run out of almost all of its funds, and the loss has created the need to expend significantly more time and effort trying to clarify what happened to the missing documents, and in getting an accounting completed." Accordingly, the court ordered appellant to disgorge all attorney fees she received -- $22,330 -- to respondent. This appeal followed.[9]

DISCUSSION

A. *Lack of Notice*

Appellant contends she did not receive proper notice of the March 16 hearing or the hearings that led up to it, because notice was served by mail to her former office address. We find notice was proper.

"Successful service by mail requires strict compliance with all statutory requirements . . . ." (*Lee v. Placer Title Co.*

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[9] On May 1, 2017, the court approved the final accounting. On June 21, the court modified the March 16 order, directing appellant to pay the funds directly to Davis's client trust account. The parties suggest appellant's notice of appeal, filed in May, may have been premature. Rule 8.104(d)(2) of the Rules of Court permits a reviewing court to treat a notice of appeal filed "after the superior court has announced its intended ruling, but before it has rendered judgment," as having been filed immediately after judgment. The court announced its resolution of the issues pertinent to appellant in the March 16 order. Assuming the June 21 order was the final, appealable order, we deem it as the judgment entered after the court announced its intended ruling.

(1994) 28 Cal.App.4th 503, 509.) Rule 2.200 of the Rules of Court requires an attorney whose mailing address "changes while an action is pending" to "serve on all parties and file a written notice of the change." In setting forth the requirements for service by mail, section 1013 of the Code of Civil Procedure provides that notices and accompanying papers "*shall be* deposited in a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, *at the office address as last given by that person on any document filed in the cause and served on the party making service by mail*." (Code Civ. Proc., § 1013, italics added.) If served in accordance with section 1013, service is deemed "complete at the time of the deposit." (*Ibid.*; see *Sharp v. Union Pacific R.R. Co*. (1992) 8 Cal.App.4th 357, 360 [service complete "at the time the document is deposited in the mail"; sender "does not have the burden of showing the notice was actually received by the addressee"].)

Here, the notices were sent to the office address appellant gave in the proceeding. Accordingly, she was appropriately served by mail. (See *Lee v. Placer Title Co*., *supra*, 28 Cal.App.4th at p. 510 [where notice was "not sent to the 'office address as last given by [the party] on any document filed in the cause'" as required by Code of Civil Procedure section 1013, "notice was not effective"]; *Whitehead v. Habig* (2008) 163 Cal.App.4th 896, 903 [service

to address from which party had been evicted was proper because party "never filed change of address with the court," although sender had knowledge of the eviction and constructive notice of a new address].)[10]

Appellant claims she had no obligation to file a change of address because she had "turned over all of her files" and "believed that she had no further connection to the matter." As the prior attorney for the Trust, appellant must have been aware that receipt of attorney fees from Trust funds required her to submit a request and obtain approval from the court. Indeed, in her declaration of March 2017 and at the March 16 hearing, she requested a continuance to allow time to file a petition to support her claimed attorney fees, which she acknowledged had never been properly documented.[11]

In any event, there was no prejudice, as the record establishes that appellant had actual notice of the March 16 hearing and its purpose. The clerk of the court sent notice of the OSC to the Wilshire Boulevard address, and appellant appeared at the hearing on March 3. There, the court

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[10] Appellant cites Rule 5.26 of the California State Bar rules for the proposition that "'[a] party must serve a member at the member's address in the State Bar's membership records.'" That provision applies only to State Bar proceedings. (See Rule 5.20.)

[11] In her reply brief, appellant acknowledges that there was an implicit request for attorney fees in the last proposed accounting she filed on respondent's behalf in January 2016 -- a request that was not formally denied until May 2017.

provided appellant an opportunity to review the court file, which she reportedly did. Appellant claims she did not have time to carefully review the documents filed by Davis because there is a time limitation for viewing documents at the courthouse. However, none of the documents were lengthy, and in August 2016, she had been sent an email listing most of the specific documents respondent believed were missing. Moreover, appellant admits being aware that the court was considering ordering disgorgement of fees for her failure to turn over documents. She had nearly two weeks to prepare a responsive declaration. That she was unable to submit a more persuasive one was not due to any lack of notice.

B. *Relief From Default Under Section 473*

Appellant contends she was entitled to relief under Code of Civil Procedure section 473 (section 473). Although she never formally requested such relief, she apparently believes the court should have recognized her request for additional time to constitute such a request. We conclude that even had she made such a request, she was entitled to no relief under that provision.

Section 473 grants a court discretion "upon any terms as may be just," to "relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (§ 473, subd. (b).) In addition, under a separate, mandatory

provision, "the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (*Ibid.*) As explained in *Martin Potts & Associates, Inc. v. Corsair, LLC* (2016) 244 Cal.App.4th 432, the mandatory relief provision is narrow in scope and "only available for defaults, default judgments, and dismissals." (*Id.* at p. 438.) Appellant did not suffer a default, default judgment or dismissal. Moreover, by its terms, it applies only to defaults entered against the "client." Here, appellant seeks relief for herself based on her own negligence. (*Id.* at p. 437.)

Relief under the discretionary provision of section 473 requires the moving party to show ""'that [the] mistake, inadvertence, or general neglect was excusable'"" and that ""'a reasonably prudent person under the same or similar circumstances' might have made the same error.'"" (*Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1146.) The policy behind the provision is to ensure that legal controversies are adjudicated "on the merits." (*Ibid.*) Appellant contends the failure to file and serve a change of

address was a mistake any reasonably prudent attorney could have made. The court did not order the disgorgement because appellant failed to attend the February 1 hearing or to file a more comprehensive response to the OSC; it ordered disgorgement because appellant failed to maintain the documents given to her by respondent and needed by Davis to complete the accounting, and failed to submit an approvable accounting despite nearly five years of representation. The court expressly stated it did not see how additional input from appellant would alter its decision.

Appellant contends that had she had more time, she could have provided information to the court concerning respondent's loss of crucial Trust documents, as set forth in respondent's April 2012 declaration. The issue below was not whether respondent herself lost documents, but whether appellant returned specific documents provided her by respondent and evidently used in preparing the three proposed accountings appellant submitted to the court on respondent's behalf. Appellant did not need additional time to present evidence that respondent failed to cooperate with her, assuming that were true, or to contradict respondent's contention that she lost a short list of specific documents.

Appellant contends the court should have taken into consideration opposing counsel's "misconduct" in "tak[ing] advantage" of appellant's "'mistake, surprise, inadvertence or neglect'" or her "motives and behavior," implying Davis was or should have been aware she was sending notices to an outdated address. Davis mailed notices and other papers

to the address mandated by the Code of Civil Procedure. As we have said, it was not appellant's inadvertence and neglect in failing to submit a change of address form or to appear at all the hearings that caused the court to order disgorgement of fees, but her failure to maintain her client's documents and her failure to submit an approvable accounting during her nearly five years of representation. Moreover, appellant ignored her client's requests for billing statements and the court's multiple requests to submit an accounting detailing the attorney fees incurred on the Trust's behalf during that period. Davis's vigorous representation of her client in pointing these matters out to the court and seeking redress was not improper.

Appellant further contends the court should have doubted the credibility of respondent and Davis because respondent had "unclean hands" and "plenty of reason to lie," and Davis's primary motive was to create an account from which to collect her fees. "Credibility is an issue for the fact finder." (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622.) Appellate courts "do not reweigh evidence or reassess the credibility of witnesses." (*Ibid.*) When, as here, "'the evidence gives rise to conflicting reasonable inferences, one of which supports the findings of the trial court, the trial court's finding is conclusive on appeal. [Citations.]'" (*Id.* at p. 623; see *In re Stephen W.* (1990) 221 Cal.App.3d 629, 642 ["'[W]e have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to

resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom.' [Citations.]"].) In any event, the court had ample reason to doubt appellant's credibility, as she was evasive when Davis first tried to obtain respondent's files, and never expressly denied she had been given the documents identified by respondent or challenged Davis's assertion that she must have had additional documents when she prepared the three proposed accountings.

C. *Disgorgement as Remedy*

Appellant does not dispute that the court had the power to order her to disgorge fees paid her by respondent, either in her own name as trustee or in the name of the Trust. (See *Estate of Cassity* (1980) 106 Cal.App.3d 569, 572 ["Allowance of compensation [for trustee and attorney fees] rests in the sound discretion of the trial court, whose ruling will not be disturbed on appeal in absence of a manifest showing of abuse. [Citations.]"]; *Kasperbauer v. Fairfield* (2009) 170 Cal.App.4th 785, 792 ["Section 16247, permitting [the trustee] to hire attorneys to advise and assist him in the administration of the Trust, authorizes the court to order attorney compensation to be paid from Trust assets."].) Citing *Frye v. Tenderloin Housing Clinic, Inc*. (2006) 38 Cal.4th 23 (*Frye*), however, appellant contends that respondent sustained no damage, and the order for disgorgement fails as a matter of law.

In *Frye*, a nonprofit legal clinic was denied legal fees because it failed to register with the State Bar as a professional law corporation and did not otherwise meet statutory requirements for a professional law corporation. (*Frye*, *supra,* 38 Cal.4th at p. 36.) The California Supreme Court found that "[u]nder no imaginable circumstances would [the client] have fared better had [the corporation] registered with the State Bar and complied with [the Corporations Code]." (*Id*. at p. 48.) Under the circumstances, "'[t]o require disgorgement of fees because of a failure to register the corporation . . . is disproportionate to the wrong.'" (*Ibid*., quoting *Olson v. Cohen* (2003) 106 Cal.App.4th 1209, 1215.) Here, the disgorgement order was not the result of appellant's failure to comply with a technicality, but of her failure, year after year, to competently perform the work for which she was hired, and her failure to return client files needed by the new attorney to redo the work. *Frye* provides no basis for reversal.

DISPOSITION

The order is affirmed. Respondent is awarded her costs on appeal.

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MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.